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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-33

JIMMY CICERO ATKINSON, and
MOLDEN ATKINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT N. LEVIN
1800 M Street, N.W., Suite 950
Washington, D.C. 20036
(202) 293-3170
Attorney for Petitioners

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Petitioners pray that a writ or writs of certiorari issue to review the United States Court of Appeals for the Fourth Circuit made and entered in the above-entitled cause on June 11, 1976.

OPINION BELOW

A judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 11, 1976 affirming a decision of the United States District Court for the

Eastern District of North Carolina denying Petitioners' Motion for New Trial and related discovery Motions which had been entered July 16, 1975. Petitioners do not believe that either opinion has been reported. The opinions are appended as A and B respectively. An earlier opinion in this case was reported as *United States v. Atkinson*, 512 F.2d 1235 (C.A. 4, 1975).

JURISDICTION

This Petition seeks review of a judgment of a Court of Appeals in a criminal matter within the meaning of 28 U.S.C. 1254(1) thereby invoking the appellate jurisdiction of this Court.

QUESTIONS PRESENTED

1. Did the Court below err when it applied as the standard of materiality by which it judged newly discovered evidence of perjury by a government sponsored witness a requirement that the newly discovered evidence would have to "probably produce an acquittal" rather than the standard set forth by this Court where a new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."

2. Did the Court below err when it held newly discovered evidence of perjury by a government sponsored witness (an undercover operative) in regard to his own recent criminal conduct and record to be cumulative to evidence of a much earlier conviction, where the newly discovered evidence was offered to impeach for interest rather than for character and where the newly discovered evidence contradicted the witness' testimony and thus could not be cumulative.

3. Did the Court below err when it disregarded newly discovered evidence of perjury by a government sponsored witness (an undercover operative) on the ground that the perjury was unknown to the Assistant United States Attorney who tried the case, where the perjury was known to State police officials participating in the prosecution.

4. Did the Court below err in applying the general rule for testing the sufficiency of newly discovered evidence, rather than the particular rule applicable to newly discovered evidence of perjury by a government sponsored witness.

5. Did the Court below err when it sustained a Federal conviction based upon the actions and testimony of State police officers and undercover operatives where had the trial been had in State court, as it could have been, the conviction would have had to been reversed on Fourteenth Amendment grounds.

6. Did the Court below err in sustaining the negative ruling of the District Court on Petitioners' Motion for New Trial, where the District Court granted a material government application on an *ex parte* basis; refused Petitioners an evidentiary hearing; and refused Petitioners the opportunity to present oral argument, particularly where the Court below failed utterly to even allude to the procedural issues which had been fully briefed and argued before it.

7. Did the Court below err when it ruled that the jury would not have discredited the testimony of a government sponsored witness upon a showing that the witness had (a) committed perjury and (b) had an interest in maintaining the good will of police and prosecutors as shown by the numerous recent criminal proceedings

against him which ended with discretionary dismissals including narcotic related arrests and convictions for burglary and petty larceny as to which he received probation.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

RULES INVOLVED

The Rules involved are Rules 16 and 33 of the Federal Rules of Criminal Procedure. There are no particular statutory questions involved. Rule 33 provides in pertinent part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand

> of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

Petitioners were convicted by a jury of possession and possession with intent to distribute a controlled dangerous substance under 21 U.S.C. 841(a) in the United States District Court for the Eastern District of North Carolina on November 21, 1973. Petitioner Molden Atkinson was sentenced to imprisonment for a term of thirty years (a sentence later reversed by the Court of Appeals and reduced to fifteen years. *See* 512 F.2d at 1240). Petitioner Jimmy C. Atkinson was sentenced to fifteen years, under the Young Adult Offender statute. Thus jurisdiction in the trial court was conferred by Title 18, U.S.C. and Rule 33 in the first instance for purposes of Rule 21(1)(g) of this Court.

After trial and while the case was before the Fourth Circuit on direct appeal, Petitioners' then counsel discovered that one of the government's witnesses (one Arthur Burke) had committed perjury in regard to his own criminal record and involvement with local prosecutorial forces. Petitioners filed a Supplemental Brief seeking reversal on that ground and (in the alternative) a Motion seeking remand to the trial court for a hearing on the newly discovered evidence. The Court of Appeals affirmed the convictions and denied the Motion stating that its actions were without prejudice to application being made to the trial court for a new trial. *See* 512 F.2d at 1240.

Briefly stated, the witness had testified that he had not been in trouble with the law since 1968, had never been arrested on a narcotics related charge and had become an informant to repent for his past misdeeds. The newly discovered evidence (which consisted of certified copies of state court records) demonstrated that the witness had close to a score of arrests more recent than 1968 which had been nolle prosequi'd by state prosecutors for charges ranging from possession of heroin and related paraphernalia to burglary to assault with a deadly weapon. He had been convicted of burglary and petty larceny and received probation.

Following the suggestion of the Fourth Circuit, Petitioners filed a Motion for New Trial pursuant to Rule 33, Federal Rules of Criminal Procedure on the ground of newly discovered evidence. In conjunction with that Motion, Petitioners filed discovery requests under Rule 16, Federal Rules of Criminal Procedure. On May 16, 1975, the government filed a Motion to stay the discovery requests pending determination of the merits of the Rule 33 Motion. On May 17, 1975 the District Court granted the stay without prior notice to Petitioners. On July 16, 1975 the District Court, without allowing either oral argument or an evidentiary hearing denied all of the pending Motions. (See Appendix B).

The case was again appealed to the Fourth Circuit, which affirmed the actions of the trial court in a per curiam opinion. (See Appendix A).

STATEMENT OF RULE 19 REASONS

As shown below, the decisions reached below are inconsistent with prior decisions of this Court, particularly in

regard to a line of cases running from *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) through *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972). It should also be noted that while not announcing a different rule of law, the decisions below are in sharp conflict with decisions in other circuits, e.g.'s, *United States v. Rosner*, 516 F.2d 269 (C.A. 2, 1975) and *Rhinehart v. Rhay*, 440 F.2d 718 (C.A. 9, 1971). The decisions below are also inconsistent with the Fourth Circuit's own precedents. *See Barbee v. Warden*, 331 F.2d 842 (C.A. 4, 1964) and *United States v. McCoy*, 478 F.2d 846 (C.A. 4, 1972).

REASONS FOR GRANTING THE WRIT

I

The decisions of the lower courts clearly violate prior decisions of this Court in regard to the standards of materiality by which newly discovered evidence of perjury by a government sponsored witness is to be measured.

The basic facts before the Court are not contested. A joint State and Federal force of narcotics officers used the services of one Arthur Burke, an undercover operative, to purchase narcotics in North Carolina. Burke operated under the direct supervision of the State Bureau of Investigation of North Carolina. The government called Burke to corroborate the testimony of a State policeman after that officer's testimony had been vigorously challenged on cross-examination. Burke and the officer were the only witnesses to the alleged transaction.

Burke simply lied when cross-examined about his own criminal record. He falsely denied any narcotics arrests

or any convictions since 1968. He concealed the long string of prosecutions which has been nolle'd by state prosecutors. The record suggests and Petitioners have claimed (without demurrer from the government) that Burke's SBI superiors, who were familiar with Burke's recent record, were present in the court while Burke was testifying so falsely.

In an unbroken line of cases, this Court has treated convictions based, even in small part, on perjured testimony with extreme distrust. While it may be fashionable to debate the "Burger Court" v. the "Warren Court" it is more instructive to note the similarity between Mr. Chief Justice Warren's statement in *Mesarosh v. United States,* 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed. 201 1 (1956):

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124, 76 S.Ct. 663, 668."

> The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." (352 U.S. at 14)

and Mr. Chief Justice Burger's statement in *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972):

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra,* at 269, 79 S.Ct., at 1177 (405 U.S. at 153-154).

In the instant case, the District Court clearly misread the teaching of this Court. The District Court held, on the

strength of a clearly inapplicable case, *Frankfeld v. United States*, 111 F. Supp. 919 (D.C. Md., 1953), aff'd 207 F.2d 413 (C.A. 4, 1953) that:

> In discussing the sufficiency of newly discovered evidence to warrant the grant of a new trial under rule 33 of the Federal Rules of Criminal Procedure . . . the applicable rules are succinctly summarized as follows: 'A Motion based on newly discovered evidence must disclose . . . (3) *that it will probably produce an acquittal, . . .*' (emphasis added).

This ruling was affirmed by the Court of Appeals.

The correct standard was that announced by this Court in *Giglio v. United States, supra:*

> A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." *Napue, supra,* at 271, 79 S.Ct., at 1178 (405 U.S. at 154).

In light of the conventional learning the Petitions for Certiorari should not be lengthy, Petitioners will simply point out without lengthy argument or quotation that the quoted *Giglio* standard was a summarization and distillation of almost a dozen opinions of this Court spread over a period of forty years dealing with perjury, concealment of evidence and other species of prosecutorial or police overreaching. Simply stated this Court has recognized that considerations of the integrity of the judicial process outweigh the need to preserve finality in a given case. Given the existence of the perjury, the applicable standard for weighing the impact of the newly discovered evidence is much lower than that employed for more conventional Rule 33 purposes. As stated by the *Mesarosh* Court, the

explanation for the different standard is both simple and profound:

> The government of a strong and free nation *does not need* convictions based upon such testimony. (352 U.S. at 14) (emphasis added).

II

The decisions of the lower courts violate the teaching of this Court in regard to the interaction between State and Federal prosecutorial forces.

The courts below have held that because Burke was employed by the State rather than Federal authorities and because the Federal prosecutors apparently did not have personal knowledge of his perjury, that the Federal government is not chargeable with the perjury and that therefore these tainted convictions should be upheld. This Court has rejected such a "silver platter" doctrine. In *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d, 1669 (1960), Mr. Justice Stewart stated the rule as follows:

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal

investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered." (364 U.S. at 221-222)

On the facts of this case the results reached by the courts below are particularly anomalous. The government's brief before the Court of Appeals contained the following representation:

> Furthermore, the investigators of this case were federal – federal Drug Enforcement Agents and Customs Agents organized the case, made arrangements to have the state agent come from Greensboro and got someone to introduce that agent to the proposed seller. The federal agents conducted the surveillance, were responsible for the heroin and did the laboratory analysis. (Appellee's Brief, p. 6).

Assuming that something turns on the question of State v. Federal (and it is clear that it should not under *Elkins*), the government's statement makes it clear that this entire matter should have been treated as if Burke were a Federal "special employee."

It appears that the lower courts would have reached a different result if Burke and the Prosecutor were both "state" or both "Federal." Indeed, if both were "state" then under *Mooney v. Holohan, supra,* the Fourteenth Amendment would void these convictions. If both were "Federal," *Mesarosh* and *Giglio* make it clear that the lower courts, under their supervisory jurisdictions should have required a new trial. However, as shown above, under *Elkins,* this entire issue is simply a red herring. In *Giglio* terms, this record shows "deliberate deception of a [Federal] court and jurors" (405 U.S. at 153) and this

Court has the responsibility as the final guardian of the integrity of the Federal Courts to correct that situation.

In addition it is interesting to note that Fourteenth Amendment state cases and Federal supervisory cases were cited interchangeably by Chief Justice Burger in *Giglio*, see quotation at page 9 above. Finally, in *Giglio* this Court reaffirmed the rule of *Brady v. Maryland* that the good faith or bad faith of the prosecutor is not the issue. *See Brady v. Maryland*, 373 U.S. at 87. In *Elkins*, this Court demonstrated a clear understanding of the danger of "inviting" Federal authorities "not to know" what their state colleagues know. In the instant case, the lower courts have compounded the danger by, in effect, inviting Federal prosecutors not to ask searching questions into police-informer understandings.

III

The lower courts misapplied prior decisions of this Court in regard to the role of the newly discovered evidence.

Giglio v. United States, supra, succinctly stated the significance to be attached to perjury of an informant who might be seeking favorable treatment from the forces of the law. As stated there, that significance is:

> Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it. (405 U.S. at 154-155).

In contrast the Court of Appeals and the District Court insisted on treating the newly discovered evidence as cumulative to Burke's admitted shady past. However, in every relevant case found by counsel, the government witness

committing perjury had been identified to the jury as a member of the criminal sub-culture, e.g., *Giglio, supra, Mesarosh, supra, Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Indeed, it is difficult to conceive of an informer-witness who would not have been so identified. However, that fact has never preserved a conviction tainted by perjury as to possible interest. If the rule followed by the lower courts is allowed to stand, then cases such as *Giglio* and *Napue,* both of which concerned unsavory informants, will have been overturned. It cannot be the law and is not the law under *Giglio* that a witness who admits some criminal act in the past has a license to lie about the bulk of his record and his expectations of favorable treatment.

IV

The lower court violated prior decisions of this Court in regard to Petitioners' procedural rights and this Court should grant the Writ to clarify the procedural requirements of Rule 33 of the Federal Rules of Criminal Procedure.

Coupled with their Motion under Rule 33, Petitioners filed discovery Motions under Rule 16 and on the strength of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and the Jencks Act (18 U.S.C. 3500) and requested an evidentiary hearing. The central thrust of the requested discovery was aimed at obtaining a complete statement of Burke's criminal record and a statement as to which elements of the prosecution were aware of his perjury. As has been shown above, much has been made of who did or did not know about Burke. However, the government has not volunteered any information and the lower courts refused to order the government to use its vast resources in this area to illuminate the record.

Despite the lack of an evidentiary proceeding, the Court of Appeals found "that if the jury had known of the arrest for a state narcotic violation and its subsequent nol-pros that additional information would have no effect whatsoever on the verdict." How an appellate tribunal could reach such a finding with no evidentiary record before it is less than clear.

In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 227, 98 L.Ed. 654 (1954), Petitioner discovered after trial that an F.B.I. agent had made a jesting remark to one of the jurors. The remark was clearly improper (as was the perjury in this case). The lower courts refused to hold a hearing on the possibility of prejudice because they were satisfied that the Agent's remarks were nonprejudicial. This Court made short work of the whole issue as follows:

> We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. (347 U.S. at 229-230)

In *Mitchell v. United States*, 368 U.S. 439, 82 S.Ct. 462 (1962), Petitioner alleged that he had been convicted on materially false testimony. In a per curiam opinion this Court vacated the judgments below and ordered the case "remanded to the District Court for a hearing upon petitioner's motion, treated as a motion for new trial on the ground of newly discovered evidence." *Mooney v. Holohan, supra*, was another case where even a weak allegation of prosecutorial wrongdoing and perjury were sufficient for this Court to remand for the purpose of having the trial court hold a hearing.

Taken together the precedents of this Court, which were cited in Petitioners' briefs below, were not followed by the courts below.

There really is very little learning as to the procedures to be followed in a Rule 33 proceeding. The usually comprehensive *Moore's Federal Practice, (¶33.03[3])* states the law as follows:

> The Rules do not specifically provide for discovery procedure in aid of motions for a new trial. Rule 16 is intended to cover *pretrial* discovery. Notwithstanding the absence of express authority for discovery in connection with a motion based upon newly discovered evidence, it appears from the Supreme Court's opinion in *Harris v. Nelson* [394 U.S. 286 (1969)] that the trial court is empowered in an appropriate case to fashion such discovery procedures, by analogy to Rule 16 or otherwise. The *Harris* case rejected the claim that Civil Rule 33, dealing with discovery interrogatories, was in terms applicable in a Section 2255 proceeding but confirmed the power of the trial court to provide the facilities necessary for

> an adequate inquiry, utilizing familiar discovery procedures where appropriate. In the context of Criminal Rule 33 the clearest situation for considering the exercise of this power would appear to be a motion for a new trial based upon alleged prosecutorial suppression of evidence. (footnotes omitted).

The instant case raises serious questions of suppression of evidence by the police.

Professor Wright's suggestion that the rule of *Harris v. Nelson* be extended from the Section 2255 situation to a Rule 33 situation on a showing of prosecutorial suppression is particularly apt in the instant case. A Rule 33 Motion showing newly discovered evidence of police or prosecutorial misconduct raises constitutional issues of a sort that could well be reached in a habeas proceeding. Indeed Rule 33 cases and Section 2255 cases have frequently been cross-cited. For example, in *United States v. Wolfson*, 413 F.2d 804, 808 (C.A. 2, 1969), the Second Circuit found *Harris v. Nelson* authority for requiring discovery in a Rule 33 situation as follows:

> "In some instances when exculpatory evidence not known by a defendant to exist at the time of trial is later shown to have then been in the Government's hands and the information necessary to develop fully the exculpatory nature of the evidence must be obtained from government sources it might be improper for a district judge to deny a motion for discovery when coupled with a timely motion for a new trial, cf. Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969).

An interchangeability of the various post conviction remedies is also evidenced by *Mitchell v. United States, supra.*

To date, Petitioners have in their possession only part of the story. It would be a simple thing for the government to comply with the discovery requested. Had the discovery been ordered or volunteered the courts would have been able to proceed with confidence as to the scope of the issues before them. *See Remmer v. United States, supra.*

What would the result in this case have been if – hypothetically – it turned out that the Federal agents were fully aware of Burke's record and perjury or if Burke has had Federal prosecutions terminated on favorable terms or . . . etc.? It is clear that Petitioners have found only State prosecutions, and then only North Carolina prosecutions in one county. Burke admitted to one old New York conviction. This Court cannot be assured that the full F.B.I. or D.E.A. records on this witness would not have changed the result reached below.

It must be remembered that even the government termed Burke's testimony as being "false" in its brief before the Court of Appeals. The newly discovered evidence has never been disputed. Thus, Petitioners are not engaged in a fishing expedition when they seek the whole truth of this matter. The lower courts have never explained their denial of the requested discovery or of the requested hearing.

Based upon the foregoing it is clear that this Court has before it and the lower courts had before them only part of the story. The part presented to the lower court clearly demonstrated perjury by a special police employee. The evidence suggests very strongly the issue of interest which was found to be so critical in *Giglio*. It is clear that both lower courts determined it significant that Burke was a State informant and not a Federal informant. Both courts found it significant that the Federal Prosecutor was

not alleged to have had personal knowledge. However, at this point no one, except perhaps the government knows the full scope of Burke's perjury or is aware of how many of the law enforcement personnel were familiar with the facts. Without determining the full scope of the issues suggested by the evidence obtained by Petitioners the question of the degree of prejudice is purely speculative as was the gratuitous determination by the Court of Appeals at 512 F.2d 1240 that Petitioners' trial attorneys had not shown due diligence in uncovering Burke's record. What is required is an evidentiary hearing following meaningful discovery. It is possible, of course, that the required discovery would be of such a nature that the trial Court could make a judgment without requiring witnesses to be placed on the stand. However, this Court should make it clear that persons in Petitioners' position, i.e., persons who have demonstrated that their motions for new trial are not frivolous, are entitled to oral argument so that the significance of the newly discovered evidence may be properly explained to the trial Court.

CONCLUSION

For the reasons aforesaid it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT N. LEVIN
1800 M Street, N.W., Suite 950
Washington, D.C. 20036
(202) 293-3170
Attorney for Petitioners

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1999

UNITED STATES OF AMERICA,
Appellee,

v.

JIMMY CICERO ATKINSON,
MOLDEN ATKINSON, a/k/a POPPY,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT WILSON. JOHN D. LARKINS, JR., DISTRICT JUDGE.

(Argued May 3, 1976 Decided June 11, 1976)

Before BRYAN and FIELD,
Senior Circuit Judges, and
CRAVEN, Circuit Judge.

Robert N. Levin for Appellants; Christine A. Witcover, Assistant United States Attorney, and (Thomas P. McNamara, United States Attorney on brief) for Appellee.

PER CURIAM:

This is an appeal from denial of a motion for a new trial on the ground of newly discovered evidence. At trial, government witness Burke admitted on cross-examination that he was a narcotics addict and a government informer, and that he had an extensive prior criminal record including many serious offenses. He was then asked whether he had been convicted of any narcotics offenses and answered truthfully that he had not. Asked whether he had been arrested and charged with a narcotics offense, he answered that he had not, when in truth he had been arrested and charged in a state court with at least one such offense but the charge had been subsequently "nol. prossed."[1] We think the jury got a clear picture of Burke's character and background, including his disposition to commit crime and his status as a government informant, and that if the jury had known of the arrest for a state narcotics violation and its subsequent nol-pross that additional information would have had no effect whatsoever on the verdict. *See* 2 Wright, Federal Practice and Procedure: Criminal § 557, p. 525.

There is nothing in the record to suggest the prosecutor knew of the alleged state narcotics offense. Thus, there is no question presented of prosecutorial misconduct.

AFFIRMED.

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[1] Ordinarily, in cases not involving informers, evidence of prior charges not resulting in convictions is inadmissible to impeach a witness. Here, apparently, there was no objection to the question, and we need not decide whether greater revelation is required of an informer witness.

Burke also testified that his last criminal conviction was in 1968. He was convicted in 1972 of temporary taking of a motor vehicle.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

No. 3924-Cr.

UNITED STATES OF AMERICA	:	Memorandum
v.	:	Opinion and
JIMMY CICERO ATKINSON, MOLDEN ATKINSON	:	Order

LARKINS, District Judge:

The defendants, Jimmy Cicero Atkinson and Molden Atkinson, through counsel, present to the Court a Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The defendants were convicted by a jury of both counts of a two count Indictment for possession of heroin with intent to distribute and for distribution of heroin, both in violation of 21 U.S.C. § 841(a)(1). The United States Court of Appeals for the Fourth Circuit in *United States v. Atkinson*, Nos. 74-1034, 74-1035 (4th Cir., February 24, 1975), affirmed the convictions but ordered a remand with instructions to vacate one of the two 15-year sentences imposed upon the defendant Molden Atkinson. The defendants now request a new trial in this matter on the grounds of newly discovered evidence.

The issue presented here in the Motion for New Trial was presented in a Motion for Stay of Proceedings and Remand on the appeal of their convictions to the Court of Appeals. That Court denied the Motion for Remand without prejudice to the defendants' right to make the Motion for New Trial here in the United States District Court. The appellate court expressed no opinion upon the merits of the defendants' motion.

Along with their Motion for New Trial in which the defendants request a new trial in this matter on the grounds of newly discovered evidence, there is also before the Court a Motion for Discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500 and a Motion for Hearing, the purpose of which is to examine the causes and consequences of the false evidence supplied at the trial of the defendants.

The "newly discovered evidence" on which the defendants rely to support their motion is the criminal background of Arthur L. Burke, a prosecution witness they contend committed such perjury as to require a new trial. That testimony of Burke's which the defendants contend is so perjurious as to require a new trial is as follows:

Q. [Herbert B. Hulse, for defendants on cross-examination of Burke] What have you been arrested and convicted of?

A. Possession of burglary tools, possession of stolen goods, burglary of an automobile in New York back in the 1940's.

I have been arrested for domestic problems, you know, family problems

Q. When was the last conviction?

A. The last conviction, I came out of the correctional institution in Raleigh, in 1968.

Q. What was that charge for?

A. Possession of burglary tools and possession of stolen goods.

Q. You never had any narcotic related convictions?

A. No, sir, I never have.

Q. How about arrest?

A. No, sir.

Q. All right. [Trial Transcript, pp. 233-234.]

It was revealed to the jury that Burke was a confidential source as informant for the North Carolina State Bureau of Investigation and that Burke had been an addict for many years and had been convicted of a crime because of addiction. [Trial Transcript, pp. 222, 228, 247-249, 251]. After the defendants' trial counsel for defendants investigated Mr. Burke's background and discovered a variety of narcotic related arrests of Burke, many or all of which were not prosecuted. Also discovered were convictions of a non-narcotic related nature that Burke had failed to disclose at trial.

In their Motion for Stay of Proceedings and Remand addressed to the Court of Appeals, the defendants in their brief filed in that Court made it plain that they made no claim that the prosecuting attorney had knowledge of the background of Mr. Burke at the time of the trial. The defendants present no evidence to this Court of prosecutorial misconduct; however, it is not so clear whether or not the defendants make such a claim in their brief in support of their motion for a new trial in this Court. To assert such a claim contrary to their allegations in the appellate court,

it appears that they should have good reason and should inform the Court. An examination of their brief filed in this Court reveals that they make no direct claim of prosecutorial misconduct. In any event it is the opinion of this Court that such a contention would be for nothing in view of the fact that the Court of Appeals did hold that the information was not known and could not have been inferred by the record to have been known by the United States Attorney. *United States v. Atkinson*, Nos. 74-1034, 74-1035 at 12-13 (4th Cir., February 24, 1975). After a thorough examination of the record, this Court concurs in this finding by the appellate court. Thus, here is an assertion by the defendants that the United States Attorney violated his duty by not disclosing information he *should have* known relating to Burke's background and, further, that the perjury by Burke was so harmful as to require a new trial.

Generally Courts do not favor motions for a new trial on the grounds of newly discovered evidence. The reason for this is obvious and that is, a man is entitled to only one day in court; however, if he should produce evidence exonerating himself then no court wishes a defendant to remain in jail. Accordingly the Fourth Circuit has developed a rather exacting standard which must be met before such a motion may be granted. As the District Court held in *United States v. Frankfeld*, 111 F. Supp. 919 (D.C. Md., 1953), aff'd 207 F.2d 413 (4th Cir., 1953):

> In discussing the sufficiency of newly discovered evidence to warrant the grant of a new trial under Rule 33 of the Federal Rules of Criminal Procedure . . . the applicable rules are succinctly summarized as follows: 'A motion based on newly discovered evidence must disclose (1) that the evidence is

> newly discovered and was unknown to the defendant at the time of trial, (2) that the evidence is material, not merely cumulative or impeaching, (3) that it will probably produce an acquittal, and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant.'

See also, 2 Wright, *Federal Practice and Procedure, Criminal*, Section 557 at 515.

The newly discovered evidence on which the defendants now rely does not meet three of the above requirements. The evidence proffered as grounds for this Motion for New Trial is cumulative and impeaching; the evidence would not be likely to produce an acquittal; and, it was due to the defendants' lack of diligence that they failed to learn of the evidence.

Regarding the first point, that being the matter of the cumulative and impeaching nature of the offered evidence, there need be little discussion. The Court of Appeals found this "newly discovered" evidence to be ". . . facts which are cumulative and go to his [Burke's] credibility. . . ." *United States v. Atkinson*, Nos. 74-1034, 74-1035 at 12 (4th Cir., February 24, 1975). It is apparent upon the face of the record that the proffered evidence is cumulative and impeaching and goes to the witness' credibility. The offer of impeaching evidence in a motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure is not sufficient unless it shows an interest in the case not otherwise revealed, such as a promise of leniency to a co-defendant. *United States v. McCoy*, 478 F.2d 846 (4th Cir., 1973). Such an interest is not shown in the present action. The defendants contend

that the narcotic related arrests which were not prosecuted show an interest in the case by Burke. If such were proven to be true, demonstrating that he had been arrested numerous times and that these cases were not prosecuted would be merely reiterating Burke's informant status, thus being merely cumulative evidence and not enough to entitle the defendants to a new trial. It appears also that the proffered evidence would be inadmissible in view of the fact that questions as to a person's prior arrests, where no conviction resulted, is improper and the defendants would not be entitled to have such questions answered. The rule in this circuit is that "[i]n criminal cases a witness may be cross-examined concerning prior convictions where the crime was 'a felony, . . . '." *United States v. Frazier*, 418 F.2d 854 (4th Cir., 1969).

Secondly, it does not appear that the evidence offered would be likely to produce an acquittal. Mr. Burke was not a necessary witness in the prosecution of the two defendants. His testimony only corroborated that of North Carolina State Bureau of Investigation agent Douglas. The record appears to be void of anything produced at the trial which would have caused the jury to have disbelieved Agent Douglas when he identified the defendants as the two individuals from whom he purchased the heroin and which would not have allowed the jury to return a guilty verdict on his evidence alone. The testimony of Agent Douglas alone was enough, if believed by the jury and obviously it was, to convict the two defendants.

The defendants' failure to exercise due diligence in obtaining Mr. Burke's record requires this Court to deny their motion for a new trial. From the first day of the trial, the defendants knew of Burke's identity. However, from the affidavit of the defendants' trial attorney, it appears that

no effort was made to obtain the public record of the witness by either of the defense attorneys until after the convictions. The defense attorneys did not seek a continuance of any sort to have appropriate time to obtain this information. The witness was a known informant, former addict and criminal – the jury knew of this side of this character. If at the trial defendants felt that this information that the jury had was insufficient to properly impeach Burke's testimony, then they should have acted then and moved for a continuance. This Court is of the opinion that they did not feel this background testimony to be of great importance, in view of the fact that the jury already generally knew of the witness' background.

Finally, any perjury that may have been committed by Mr. Burke related entirely to the witness' background and not to the facts of the crime for which the defendants were on trial. There is no reason to believe that producing this information before a jury would alter the outcome of the trial in view of the fact that Agent Douglas testified as to the same facts of the transaction and made his own identification of the defendants. The collateral issues of the constitutionality of Agent Douglas' identification certainly cannot be considered "new evidence" and are in this motion improperly raised.

NOW THEREFORE, in accordance with the foregoing, it is

ORDERED, that the defendants' Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure be, and the same is hereby DENIED,

FURTHER ORDERED, that the defendants' Motion for Discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500 and their Motion for Hearing be, and the same are hereby DENIED,

FURTHER ORDERED, that in accordance with the Judgment of the United States Court of Appeals for the Fourth Circuit filed February 24, 1974, the sentence of 15 years imposed upon Molden Atkinson by this Court for conviction of the offense of possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) be and the same is hereby VACATED, and

FURTHER ORDERED, that the Clerk shall serve copies of the MEMORANDUM OPINION AND ORDER upon all counsel of record.

Let this ORDER be entered forthwith.

/s/ JOHN D. LARKINS, JR.
John D. Larkins, Jr.
United States District Judge

AT TRENTON, NORTH CAROLINA

15 JULY, 1975

Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

No. 76-33

In the Supreme Court of the United States

OCTOBER TERM, 1976

JIMMY CICERO ATKINSON AND
MOLDEN ATKINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
KATHERINE WINFREE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1976. The petition for a writ of certiorari was filed on July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioners' motion for a new trial based on allegedly newly discovered evidence.

2. Whether the district court abused its discretion by denying petitioners' requests for discovery and an evidentiary hearing on their motion for a new trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were convicted of possession of heroin with intent to distribute and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner Molden Atkinson was sentenced to two consecutive terms of 15 years' imprisonment and three years' special parole. Petitioner Jimmy Atkinson was sentenced to 15 years' imprisonment as a young adult offender, followed by a three-year term of special parole. The court of appeals affirmed the convictions but remanded with instructions to vacate one of the two sentences imposed upon petitioner Molden Atkinson (512 F. 2d 1235).[1]

While the appeal from their convictions was pending, petitioners moved, pursuant to Rule 33, Fed. R. Crim. P., for a stay of further proceedings in the court of appeals and a remand to the district court on the basis of allegedly "newly discovered" evidence that a government witness had committed perjury at trial regarding the extent of his past criminal conduct. The court of appeals denied the motion without prejudice to petitioners' right to renew it in the district court (512 F. 2d at 1239-1240). Petitioners then moved in the district court for a new trial on the ground of newly discovered evidence and requested discovery and an evidentiary hearing on their motion. After consideration of the trial record, briefs, and supporting affidavits, the district court denied petitioners' motions (Pet. App. 3a-10a), and the court of appeals affirmed *per curiam* (Pet. App. 1a-2a).

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[1]The court of appeals found that, under the circumstances of this case, petitioner Molden Atkinson had possessed the heroin only at the moment of distribution and that it was not the intent of Congress to increase the maximum sentence under the statute where, as here, two violations of the same subsection were shown by a single act (512 F. 2d at 1240).

The facts underlying petitioners' convictions are set forth in the opinion of the court of appeals on direct appeal (512 F. 2d at 1237) and, insofar as relevant to petitioners' present contentions, in the opinions of the courts below (Pet. App. 2a, 4a-5a). They show that on July 18, 1973, at their home in Goldsboro, North Carolina, petitioners sold heroin worth $1,200 to Agent Curtis Douglas of the North Carolina State Bureau of Investigation. Arthur Burke, a confidential informant for the state Bureau of Investigation who had introduced Agent Douglas to petitioner Molden Atkinson, was present during the narcotics transaction.

At trial, Agent Douglas related the circumstances of his meeting with petitioners and described the negotiations for and details of the sale of the heroin. Burke corroborated the testimony of Agent Douglas. In addition, Burke admitted that he was a paid government informant, that he had been a narcotics addict for many years, and that his extensive prior criminal record included arrests and convictions for several serious offenses. When Burke was asked on cross-examination whether he had ever been convicted of a narcotics offense, he answered truthfully that he had not; however, he falsely denied any narcotics-related arrests and incorrectly stated that his last conviction had been in 1968 (Pet. App. 4a-6a). Subsequently, petitioners learned that Burke had been convicted in 1972 of the temporary taking of a motor vehicle and had been arrested for state narcotics offenses that were not prosecuted. Petitioners contended in their post-trial motion that Burke's contrary testimony was "so perjurious as to require a new trial" (Pet. App. 4a).

The district court disagreed, holding that petitioners had failed to discover this "new" evidence prior to or during trial because of lack of diligence and that, in any event, the evidence was merely cumulative and impeaching and

was not likely to produce an acquittal (Pet. App. 7a-8a). In addition, the district court concurred in the finding of the court of appeals on direct appeal (512 F. 2d at 1239) that "the information [about Burke's criminal background] was not known and could not have been inferred by the record to have been known by the United States Attorney" (Pet. App. 6a).

ARGUMENT

1. In order to prevail on a Rule 33 motion for a new trial on the basis of newly discovered evidence, a defendant must show that the evidence was discovered after the trial, that the failure to learn of the evidence was not the result of lack of diligence, that the new evidence is not merely cumulative or impeaching, that the evidence is material to the principal issues involved, and that the evidence is of such a nature that it would probably produce an acquittal. *United States* v. *Schwartzbaum*, 527 F. 2d 249, 254-255 (C.A. 2), certiorari denied, No. 75-819, March 1, 1976; *United States* v. *Meyers*, 484 F. 2d 113, 116 (C.A. 3). The district court and the court of appeals correctly concluded that petitioners could not satisfy these requirements, and these concurrent findings of fact warrant no further review.

First, petitioners failed to demonstrate that "the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States* v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937. See also *United States* v. *Anderson*, 509 F. 2d 312, 327, n. 105 (C.A.D.C.), certiorari denied, 420 U.S. 991; *United States* v. *Strauss*, 443 F. 2d 986, 989 (C.A. 1), certiorari denied, 404 U.S. 851. As the trial court noted (Pet. App. 8a-9a):

> From the first day of the trial, the defendants knew of Burke's identity. However, from the affidavit of the defendants' trial attorney, it appears that no effort was made to obtain the public record of the witness by either of the defense attorneys until after the convictions. The defense attorneys did not seek a continuance of any sort to have appropriate time to obtain this information.

Moreover, the evidence of Burke's criminal record was merely cumulative and impeaching. Burke had admitted at trial that he was a paid informant for the North Carolina Bureau of Investigation, that he had responded to the government's request to work on the instant case (Tr. 225, 245), and that he had a checkered career that included several serious convictions. Thus, as the court of appeals observed, Burke's possible lack of credibility or motive to falsify was clearly exposed (Pet. App. 2a):

> We think the jury got a clear picture of Burke's character and background, including his disposition to commit crime and his status as a government informant, and that if the jury had known of the arrest for a state narcotics violation and its subsequent nolpross that additional information would have had no effect whatsoever on the verdict.

See *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341; *United States* v. *Blackwood*, 456 F. 2d 526, 531 (C.A. 2), certiorari denied, 409 U.S. 863.[2]

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[2] *Giglio* v. *United States*, 405 U.S. 150, on which petitioners primarily rely, is distinguishable. In *Giglio*, the evidence showed that an indispensable government witness had testified falsely about a promise of leniency and that the government was aware of the promise yet had failed to disclose it. Here, as noted above, Burke's false statements concerned details of his criminal record—a matter already largely known to the jury—rather than a critical matter such as his possible bias. Despite petitioners' baseless assertion (Pet. 14), none of

Finally, as both lower courts found (Pet. App. 2a, 8a), the "newly discovered" evidence here was not likely to produce an acquittal. Burke's false testimony related solely to his past criminal background rather than to petitioners' involvement in the crime charged. Hence, the evidence did not exculpate petitioners. In addition, even assuming that the new evidence would be admissible at a retrial,[3] Burke's trial testimony only corroborated that of Agent Douglas, and "[t]he record appears to be void of anything produced at the trial which would have caused the jury to have disbelieved Agent Douglas when he identified the [petitioners] as the two individuals from whom he puchased the heroin * * *" (Pet. App. 8a). Compare *Giglio* v. *United States*, 405 U.S. 150, 154 ("the Government's case depended almost entirely on [the witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury").

2. Petitioners contend (Pet. 14-19) that the district court erred in denying their motions for discovery and for an evidentiary hearing on their new trial claim. Although the Federal Rules of Criminal Procedure do not expressly provide for discovery in aid of motions for a new trial, the district court may permit discovery in collateral proceedings. *Harris* v. *Nelson*, 394 U.S. 286, 290.[4] Normally,

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the dismissals of state charges against Burke was contemporaneous with, much less related to, the events involving petitioners. Furthermore, unlike *Giglio*, in this case "there [was] no question presented of prosecutorial misconduct" (Pet. App. 2a). See n. 5, *infra*.

[3]As the district court and court of appeals noted (Pet. App. 2a, n. 1, 8a), a witness ordinarily may not be impeached by proof of prior arrests not leading to convictions. See Rule 609(a), Fed. R. Evid.

[4]Although *Harris* concerned a *habeas corpus* proceeding, its reasoning has been held applicable to a motion pursuant to Rule 33, Fed. R. Crim. P., at least when the new evidence is exculpatory. See, *e.g.*, *United States* v. *Wolfson*, 413 F. 2d 804, 808 (C.A. 2).

however, such motions are to be decided on the basis of the trial record and affidavits alone, and the decision whether to conduct an evidentiary hearing in a particular case is addressed to the sound discretion of the district court. *United States* v. *Scott*, 521 F. 2d 1188, 1195 (C.A. 9), certiorari denied, No. 75-5799, March 8, 1976; *United States* v. *Henson*, 486 F. 2d 1292, 1300, n. 7 (C.A. D.C.); *Gurleski* v. *United States*, 405 F. 2d 253, 267 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977.

The affidavits and other documents filed by petitioners clearly established Burke's false testimony and provided the district court with an adequate basis for assessing the materiality of the "newly discovered" evidence. Since the record showed that petitioners failed to exercise due diligence in obtaining the new evidence, that the evidence was merely cumulative and impeaching, and that it was unlikely to produce a different verdict, the court properly denied the motions for discovery and an evidentiary hearing.[5]

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[5]Although petitioners contend that a hearing was required to explore the issue of prosecutorial suppression, this Court has recently noted that a defendant's right to a new trial is determined by the evidentiary significance of the nondisclosed evidence rather than by the prosecution's willfulness or negligence in failing to produce it. *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 12-13. Thus, the district court was not required to hold an evidentiary hearing concerning prosecutorial misconduct. In any event, petitioners' motion for a stay of proceedings in the court of appeals had "made it plain that they made no claim that the prosecuting attorney had knowledge of the background of Mr. Burke at the time of the trial" (Pet. App. 5a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
KATHERINE WINFREE,
Attorneys.

SEPTEMBER 1976.

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